No. 87-1500

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

GERTRUDE BROOKS SCHUYT,

Petitioner,

—v.—

ROWE PRICE PRIME RESERVE FUND, INC., T. ROWE PRICE ASSOCIATES, INC., CARTER O. HOFFMAN, EDWARD A. TABER, III and GEORGE J. COLLINS,

Respondents.

BRIEF IN OPPOSITION TO CERTIORARI

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BRIEF OF RESPONDENTS

Question presented for review:

> Did the courts below err in denying petitioner a jury trial on equitable claims under § 20(a) and § 36(b) of the Investment Company Act of 1940?

The parties to the proceeding in the United States Court of Appeals for the Second Circuit were:

Gertrude Brooks Schuyt

Rowe Price Prime Reserve Fund, Inc.

T. Rowe Price Associates, Inc.

Carter O. Hoffman

Edward A. Taber III

George J. Collins.

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Statement of the Case

Plaintiff owned shares valued at approximately $1,000 (at time of trial) in a money-market fund called Rowe Price Prime Reserve Fund, Inc.

She challenged the compensation received for the years 1979 and 1980 by the investment adviser, T. Rowe Price Associates, Inc., as violative of § 36(b) of the Investment Company Act of 1940. In addition, she claimed that the proxy statement by which the investment advisory fee was approved by shareholders of the Fund in 1981 was misleading. She also asserted a common law claim under Maryland law which is not germane here.

Shortly before trial, defendants moved to strike plaintiff's jury demand on the ground that the relief sought was equitable, not legal. The District Court granted the motion and that grant was later affirmed by the Court of Appeals.

The case was tried on the merits in 1987 and all claims were dismissed in a lengthy and detailed Opinion by the District Court. That Opinion was affirmed in all respects by the Court of Appeals later in 1987.

Summary of Argument

1. The question presented for review by petitioner is not worthy of review by this Court because the decision of the Court of Appeals for the Second Circuit is not in conflict with the decision of any other federal court of appeals on the point, i.e. the right to trial by jury. Nor was the decision in conflict with any decision of any state court of last resort. Nor did the Court of Appeals for the Second Circuit depart from the accepted and usual course of judicial proceedings in any way.

2. In any and all events, the decision of the District Court denying a jury trial, affirmed by the Court of Appeals, was correct.

In a well-reasoned Opinion, dictated into the record several weeks before the trial, District Judge Robert J. Ward granted defendants' motion to strike plaintiff's demand for a jury trial. On appeal, plaintiff pressed her claim that her Section 36(b) claim and her proxy claim were triable to a jury, and the Court of Appeals rejected her contention.

The standard: Tull v. United States, 481 U.S. ____ (1987)

In its most recent statement on the right to jury trial, this Court stated:

> To determine whether a statutory action is more similar to cases that were tried in courts of law than to suits tried in courts of equity or admiralty, the Court must examine both the nature of the action and of the remedy sought. First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity [citations omitted]. Second, we examine the remedy sought and determine whether it is legal or equitable in nature [citations omitted].

Tull v. United States, 481 U.S. ___, 95 L.Ed.2d 365, 373 (1987). This Court then added an important caveat:

> We reiterate our previously expressed view that characterizing the relief sought is "[m]ore important than finding a precisely analogous common law cause of action in determining whether the Seventh Amendment guarantees a jury trial" [citation omitted].

(95 L.Ed.2d at 375). This Court in Tull upheld the defendant's right to a jury since the remedy sought there (a statutory penalty for money damages) was more analogous to a suit for damages than to one for "disgorgement of improper profits, traditionally considered an equitable remedy" (95 L.Ed.2d at 377). Here, of course, quite the reverse is true.

Point I —

There is no right to jury trial for a claim under § 36(b) of the Investment Advisory Act of 1940

This Court, several weeks ago, denied certiorari on the precise issue presented here: Kamen v. Kemper Financial Services, Inc., 659 F.Supp. 1153 (N.D. Ill. 1987), mandamus denied No. 87-1455 (7th Cir. April 13, 1987), cert. denied, ___ U.S. ___ 56 U.S.L.W. 3606 (March 8, 1988).

The Second Circuit, from which certiorari is sought in the instant case, had already passed upon this precise issue and held that there is no jury right in a Section 36(b) claim. In re Gartenberg, 630 F.2d 16, 18 (2d Cir. 1980), cert. denied, 451 U.S. 910 (1981), aff'g,

Gartenberg v. Merrill Lynch Asset Management, Inc., 487 F.Supp. 999 (S.D.N.Y. 1980).

Every other court which has passed upon the issue of whether a claim under Section 36(b) of the Investment Company Act is triable to a jury has also concluded that such a claim is equitable in nature, affording the plaintiff no right to a jury trial. In re Evangelist, 760 F.2d 27, 29-30 (1st Cir. 1985); Kalish v. Franklin Advisers, Inc., 87 Civ. 6919 (S.D.N.Y. Feb. 29, 1988) (unpublished Opinion of Hon. Charles S. Haight); Krinsk v. Fund Asset Management, Inc., 654 F.Supp. 1227, 1236 (S.D.N.Y. 1987); Weissman v. Alliance Capital Management Corp., [1985-86 Transfer Binder] Fed.Sec. L.Rep. (CCH) para. 92,396 at 92,439-40 (S.D.N.Y. Dec. 30, 1985), mandamus denied,

788 F.2d 5 (2d Cir. 1986); Tarlov v. Paine Webber Cashfund, Inc., 559 F.Supp. 429, 441 (D.Conn. 1983); Jerozal v. Cash Reserve Management, Inc., [1982-83 Transfer Binder] Fed.Sec.L.Rep. (CCH) para. 99,019 at 94,827 (S.D.N.Y. Dec. 29, 1982); Markowitz v. Brody, 90 F.R.D. 542, 547-48 (S.D.N.Y. 1981).

The reasoning in these cases, and, in particular, in the Second Circuit's Opinion in In re Gartenberg, was clear and unassailable. There is no reason or justification for this Court to review this question.[1]

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[1] None of the cases cited by petitioner involves a jury right under Section 36(b). Curtis v. Loether, 415 U.S. 189 (1974) merely recognized that a statutory claim may be subject to a jury trial if Congress so intended; here, as the Second Circuit and the First Circuit recognized in In re Gartenberg and In re Evangelist, Congress intended otherwise (viz., that a Section 36(b) claim is

Plaintiff's self-styling of her remedy as "damages", of course, does not make her Section 36(b) claim a "bona fide claim for damages" within the meaning of In re Gartenberg. As the late Chief Judge Friendly explained in Securities & Exchange Commission v. Commonwealth Chemical Securities, Inc., 574 F.2d 90, 95 (2d Cir. 1978):

> ... [N]ot all money claims are triable to a jury. A historic equitable remedy was the grant of restitution "by which the defendant is made to disgorge ill-gotten gains or to restore

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equitable, not legal). SCM Corp. v. Xerox Corp., 507 F.2d 358 (2d Cir. 1974), and Amer. Met. Enterprises v. Warner Bros. Records, 389 F.2d 903 (2d Cir. 1968) had nothing to do with jury rights; they involved only the question whether equitable relief will be granted where there is an adequate remedy at law, a question not involved at bar. Daily Income Fund, Inc. v. Fox, 464 U.S. 523 (1984), involved the issue of director demand, not the right to jury trial.

> the status quo, or to accomplish both objectives." And "[w]hen restitution is sought in the form and in the situations allowed in equity prior to the rules or authorized by valid statutes there is no right to jury trial." Disgorgement of profits in an action brought by the SEC[2] to enjoin violations of the securities laws appears to fit this description; the court is not awarding damages to which plaintiff is legally entitled but is exercising the chancellor's discretion to prevent unjust enrichment. [citations omitted].

Accord: Dairy Queen, Inc. v. Wood, 369 U.S. 469, 477-78 (1962) ("the consti-

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[2] As the late Judge Weinfeld noted with regard to Commonwealth Chemical Securities, Inc., "[t]he fact that the action in that case was an SEC enforcement action was considered by the Court of Appeals but was not a factor essential to its holding which turned simply on recognizing the relief sought as restitutionary in nature and on the finding that restitution was an equitable remedy." Maldonado v. Flynn, 477 F.Supp. 1007, 1011 n.14 (S.D.N.Y. 1979), mandamus denied and decision adhered to, 671 F.2d 729, 732 (2d Cir. 1982). Accord: Gartenberg, supra (487 F.Supp. at 1007).

tutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings"); Arber v. Essex Wire Co., 490 F.2d 414, 423 (6th Cir.), cert. denied, 419 U.S. 830 (1974) (denying jury trial in 10b-5 action where relief requested by plaintiff, though denominated damages, was the "monetary equivalent of rescission").

The purported distinction from In re Gartenberg which petitioner here argues (i.e. that she asked for money damages in her Third Amended Complaint) was expressly argued to and rejected by the First Circuit in In re Evangelist:

> ... [T]he right to a jury trial cannot turn on the simple substitution of a different word [citations omitted]. Otherwise, any equitable action for money, say for restitution, could become a legal action by the use of the word "damages" in place

of "restitution".

(760 F.2d at 31).[3]

In short, irrespective of how plaintiff seeks to describe her claim, it is an equitable claim which is triable to the Court, not to a jury.

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[3] Petitioner acknowledged that the relief she sought in this action was a repayment to the Fund of the excessive advisory fees paid", which she denominates "legal restitution" (Appellant's Brief to the Second Circuit, p. 41). The cases which have dealt with this question have recognized that this remedy is, in truth, a remedy for restitution, which is an equitable remedy, not a legal remedy. See, e.g. In re Evangelist, supra (760 F.2d at 29-30):

> ... [T]he remedy Congress created - the payment of any excess fee to the company - is similar to the traditional equitable remedy of an "accounting". Like other remedies of restitution, that remedy requires one owing a fiduciary duty ... to "disgorge" ... money taken in derogation of the duty.

Accord: In re Gartenberg, supra (630 F.2d at 18).

Point II —

There is no right to jury trial for a claim under § 20(a) of the Investment Company Act of 1940

Petitioner claimed a proxy violation in connection with the approval of the Investment Advisory Agreement for 1981. Petitioner sought, as relief, a declaration that the Investment Advisory Agreement was void and repayment to the Fund of "the Fund's damages", including "all of the payments made by the Fund to the defendants" under the agreement and "all of the profits earned by the defendants" under the agreement (Appendix in the Second Circuit : A-2q — A-2r).

In essence, petitioner sought rescission and restitution on her proxy

claim. Such a claim is equitable in nature, and is not analogous to a claim for legal relief, regardless of whether plaintiff asked (in her pleading) for "damages". Krinsk, supra (654 F.Supp. at 1236); Maldonado v. Flynn, 477 F.Supp. 1007, 1011 (S.D.N.Y. 1979) (Weinfeld, J.), mandamus denied and decision adhered to, 671 F.2d 729, 732 (2d Cir. 1982).[4]

The remedies sought on petitioner's proxy claim are clearly analogous to historically equitable, not legal remedies. For example, the "damages" sought

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[4] Following the late Judge Friendly's reasoning in Commonwealth Chemical Securities, Inc., quoted above, Judge Weinfeld also held in Maldonado, supra (a proxy case), that "the fact that recovery of 'money damages' is sought does not change the basic nature of the claims" for purposes of analyzing whether there is a right to a jury trial (477 F.2d at 1011). Accord: In re Evangelist, supra (760 F.2d at 31); Krinsk, supra (654 F.Supp. at 1236).

by plaintiff were, in truth, a disgorgement or repayment of monies which Price Associates, as an allegedly faithless fiduciary, had improperly taken and allegedly should have been compelled to return to Prime Reserve Fund. As explained by Professor Moore:

> ... [T]he common law remedies, particularly debt and account, were often inadequate, and equity early assumed jurisdiction to compel the payment of money, especially by but not limited to fiduciaries, the restoration or return of a specific thing ....

5 Moore's Federal Practice para. 38.24[2] at 38-194. See also: Crews v. Central States SE and SW Areas Pension Fund, 788 F.2d 332, 338 (6th Cir. 1986) ("historically, an action for restitution seeks an equitable remedy for which there is no Seventh Amendment right to a jury trial");

In re Seatrade Corp., 345 F.2d 785, 787 (2d Cir. 1965) ("Restitutionary remedies are basically equitable in nature ...").

Similarly, a declaration that the Investment Advisory Agreements were void is essentially an equitable remedy. Thus, Professor Moore has explained:

> An action for rescission or cancellation of a contract ... is traditionally equitable.

5 Moore's Federal Practice para. 38.23 at 38-187. See also: Philips v. Kaplus, 764 F.2d 807, 812-13 (11th Cir. 1985), cert. denied, 474 U.S. 1059 (1986); Arber, supra (490 F.2d at 422); Mallory v. Citizens Utilities Co., 342 F.2d 796, 797 (2d Cir. 1965); Maldonado, supra (477 F.Supp. at 1011) (restoration to status prior to wrongdoing is a "historic equitable

remedy").

In Maldonado, supra (477 F.Supp. 1007), Judge Weinfeld struck plaintiff's jury demand on a proxy claim. Plaintiff there contended that a proxy solicitation in connection with the election of directors was tainted, so that the election should be nullified and damages awarded to the corporation (477 F.Supp. at 1011). Judge Weinfeld stated:

> Each claim, whether for printing and mailing expenses or recapture of compensation and expenses paid to directors, basically seeks restitution for the benefit of the corporation. Despite plaintiff's reiterated assertion that the claims are to recover "money damages", they are essentially equitable in nature. The fact that recovery of "money damages" is sought does not change the basic nature of the claims.
>
> * * *

> In the event that plaintiff prevails, it is clear that to the extent it is established that the corporation was damaged, restitution would be the remedy.

(477 F.Supp. at 1011). Like the plaintiff in Maldonado, plaintiff here also sought damages which were, in effect, merely restitution of the profits and payments made under the Investment Advisory Agreement.[5] Such a claim is equitable and is not triable to a jury. Judge Ward correctly followed this reasoning (at A-4 and A-5), as did the District Court in Krinsk, supra (654 F.Supp. at 1236) ("a

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[5] Significantly, the factual core of petitioner's proxy claim is basically the same as that of her Section 36(b) claim. Indeed, by incorporating the allegations of her Section 36(b) and state law fiduciary duty allegations into her proxy claim (Third Amended Complaint, para. 34 at A-2k of Appendix in the Second Circuit), plaintiff effectively conceded that the proxy claim is equitable.

proxy misrepresentation that results in the continuation of a contract for advisory fees ... would lead to equitable relief ...").

The authority principally relied on by plaintiff, Dasho v. Susquehanna Corp., 461 F.2d 11 (7th Cir.), cert. denied, 408 U.S. 925 (1972), was also cited to the courts in Maldonado and Krinsk, and to Judge Ward in this case. All three judges rejected Dasho, a corporate merger case, as inapposite, on the grounds explained by Judge Weinfeld in Maldonado, supra (477 F.Supp. at 1010-1011). Indeed, Judge Weinfeld stated: "It is not altogether clear that a definitive holding was made [in Dasho] that a Section 14(a) [proxy] claim entitled one to a jury trial." (477 F.Supp. at 1011, n.12). Dasho, decided over 15 years ago, is also of doubtful

validity today since it is devoid of any remedy-based analysis, as is now clearly required by this Court in Tull, supra (95 L.Ed.2d at 375).

Conclusion

The Petition should be denied.

Respectfully submitted,

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